Supreme Court of the United States.

No. 218.—October Term, 1903.

Archie Burrell, Plaintiff in Error, vs. The State of Montana. } In error to the Supreme Court of the State of Montana.

[May 31, 1904.]

Mr. Justice McKenna delivered the opinion of the Court.

Plaintiff in error was convicted upon information filed in the District Court of the Eighth Judicial District of the State of Montana of the crime of obtaining money under false pretenses. The judgment of conviction was affirmed by the Supreme Court of the State. (27 Mont. 282.)

The false pretenses consisted of a false statement in writing made to the Royal Milling Company, a corporation, concerning his assets and liabilities, whereby he induced the company to sell him goods of great value.

Plaintiff in error testified in his own behalf, and during the cross-examination he was questioned in regard to statements made by him in testimony made before the referee in bankruptcy in his own proceedings. No objection was made.

In view of the examination the trial court instructed the jury as follows:

"The court instructs the jury that the fact that defendant testified in an insolvency proceeding in obedience to a citation did not deprive him of his right to refuse to answer questions tending to criminate him, if he did answer any such questions, and an admission made by him in such proceeding is voluntary and competent evidence in a criminal prosecution subsequently inaugurated, where he was not in custody or charged with a criminal offence when he made such admission, if he did make any such."

Plaintiff in error excepted to the instruction as follows: "For the reason that said instruction invades the province of the jury, in that it directs their attention to the alleged admissions of the defendant and is a charge upon the effect and weight of the evidence. The defendant excepts to the instruction for the further reason that the same does not correctly state the law, in this, that it appears from the testimony that the defendant had testified upon an examination before a referee in bankruptcy, held pursuant to the provisions of the act of Congress, approved July 1, 1898, which said act provides as follows: Chapter III, section, &c. 'But no testimony given by him (upon his examination) shall be offered in evidence against him in any criminal proceeding.' And the said instruction is against the law."

The instruction seems to oppose the provisions of the statute, but the circumstances of the case must be considered. There was no objection made to the introduction of the testimony, and, as we understand the instruction, it was but the expression of the value of the testimony. The contention of plaintiff in error must have been in the trial court as it was in the Supreme Court and is here, to wit, that section 7 of the bankruptcy act grants more than a mere immunity against the admission in evidence of the testimony given before the referee in bankruptcy—that it grants him protection from prosecution for any crime growing out of the transaction about which he was examined; and this necessarily to secure to him the full protection of that clause of the Constitution of the United States which provides that "no person shall be compelled in criminal cases to be a witness against himself." Upon this broad contention he must now rely. A narrower contention might have been yielded to by the State courts. It certainly should have been submitted to them. The statute does not prohibit the use of testimony against the consent of him who gave it. It prescribes a rule of competency of evidence which may or may not be insisted upon. It does not declare a policy the protection of which cannot be waived. And the time to avail of it is when the testimony is offered. After the testimony is admitted its probative force cannot be limited. This could not be contended even under the broader provision of the Constitution. A witness who voluntarily testifies cannot resist the effect of the testimony by claiming that he was not compellable to give it.

In the case at bar, the court dealt with testimony which had been admitted without question or objection. We are brought, therefore, to the broad and ultimate contention of the plaintiff. We think it is untenable. There is no ambiguity in section seven of the bankrupt act. It requires a bankrupt to submit to an examination concerning his property and affairs, and provides: "But no testimony given by him shall be offered in evidence against him in any criminal proceeding." It does not say that he shall be exempt from prosecution, but only, in case of prosecution, his testimony cannot be used against him.

The two things are different, and cannot be confounded. The difference is illustrated by the different constructions this court has given to section 860 of the Revised Statutes and the provisions of the act of Congress of February 11, 1893, c. 83, 27 Stat. 443.

In *Counselman* v. *Hitchcock* (142 U. S. 547) it was contended that the protection of section 860 was that of the Constitution, and it was sought to compel a witness to testify to matters which he claimed would incriminate him. This court held against the contention, and the witness was justified. We did not attempt to extend the section to the prohibition of criminal prosecutions, but confined its immunity to that which was ex-

pressed, to wit, that the testimony given should not "be given in evidence, or in any manner used, against him or his property or estate, in any court of the United States, in any criminal proceeding. . . ."

The act of Feburary 11 was different and the ruling upon it was different. It provided as follows:

"But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify, or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpœna, or the subpœna of either of them or in any such case or proceeding."

It was held in *Brown* v. *Walker* (161 U. S. 591) that the act was virtually one of "general amnesty," and the protection of the Constitution was "fully accomplished by the statutory immunity." As in *Counselman* v. *Hitchcock* a witness before a grand jury which was investigating alleged violations of the Interstate Commerce Act, claimed that questions addressed to him "would tend to accuse and incriminate him." Upon proceedings in the District Court he was adjudged guilty of contempt and ordered to pay a fine of five dollars and to be taken into custody until he should answer the question. He petitioned the Circuit Court for writ of *habeas corpus*, and from the judgment remanding him to custody prosecuted an appeal to this court. It was held that he was compellable to answer.

In the case at bar, as we have already said, plaintiff in error did not claim the protection afforded him by the bankrupt act. He made no objection to the use of the testimony which he gave before the referee, nor does he now urge its use as error. He broadly claimed and now claims exemption from prosecution. For the reasons we have given the claim is untenable.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.